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DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

December 22, 2005

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: April 27, 2005

Case Number: TSO-0236

This decision concerns the eligibility of XXXXX XXXX XXX (hereinafter referred to as "the Individual") to have his access authorization restored under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."¹

I. BACKGROUND

The present case concerns an individual who seeks restoration of his DOE access authorization. The Individual's access authorization was suspended when derogatory information that raised a significant doubt about his eligibility to maintain his access authorization came to the attention of a DOE Local Security Office (LSO). The LSO obtained this derogatory information during a background re-investigation of the Individual. After conducting this background investigation, the LSO concluded that the Individual failed to resolve the substantial doubts about his eligibility for a DOE access authorization that the derogatory information raised. Accordingly, an administrative review proceeding was initiated. *See* 10 C.F.R. § 710.9. The LSO then issued a letter notifying the Individual that it possessed information that raised a substantial doubt concerning his eligibility for access authorization (the Notification Letter). The Notification Letter alleges that the Individual has

(1) Deliberately misrepresented, falsified, or omitted significant information from a . . . Questionnaire for Sensitive (or National Security) Positions, . . . a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization, or proceedings conducted pursuant to § 710.20 through § 710.31, 10 C.F.R. § 710.8(f) (Criterion F);

¹ An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as an access authorization or a security clearance.

(2) Trafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law. 10 C.F.R. §710.8(k) (Criterion K);

(3) Been, or is, a user of alcohol habitually to excess. . . .10 C.F.R. § 710.8(j) (Criterion J); and

(4) Engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security . . . 10 C.F.R. § 710.8(l) (Criterion L).

The Individual filed a request for a hearing in which he made a general denial of the allegations contained in the Notification Letter. This request was forwarded to the Director of the Office of Hearings and Appeals (OHA), who appointed me as Hearing Officer.

At the Hearing, the LSO presented one witness, the DOE Psychiatrist. The Individual testified on his own behalf and called three witnesses: a coworker, his sister and his Employee Assistance Program Counselor (the EAP Counselor). *See* Transcript of Hearing, Case No. TSO-0236 (hereinafter cited as “Tr.”).

II. STANDARD OF REVIEW

The Hearing Officer's role in this proceeding is to evaluate the evidence presented by the agency and the Individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). The regulations state that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this opinion: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, including knowledgeable participation; the frequency and recency of the conduct; the Individual's age and maturity at the time of the conduct; the voluntariness of the Individual's participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

III. FINDINGS OF LAW AND FACT

A. Criterion F

On September 7, 2001, the Individual completed and submitted a Questionnaire for National Security Positions (QNSP) to the LSO for the purpose of maintaining a DOE access authorization. Question 24a of that QNSP asked “Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?” The Individual answered this question “no.” DOE Exhibit 14 (emphasis in the original).

The Notification Letter charges that the Individual’s statements during a February 28, 2002 Personnel Security Interview (PSI) and a July 13, 2004 Forensic Psychiatric Examination show that he had, in fact, used marijuana and cocaine during the seven-year period preceding the September 7, 2001 QNSP. If the Individual had used marijuana or cocaine during the seven year period prior to September 7, 2001, his answer to QNSP Question No. 24a was false. Providing false information in a QNSP raises significant security concerns under Criterion F. False statements by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See e.g., Personnel Security Hearing, Case No. VSO-0281*, 27 DOE ¶ 82,821 at 85,915 (1999), *affirmed*, 27 DOE ¶ 83,030 (2000) (case terminated by OSA, 2000); *Personnel Security Hearing, Case No. VSO-0013*, 25 DOE ¶ 82,752 at 85,515 (1995) *affirmed* (OSA, 1995).

During the February 28, 2002 PSI, the interviewer asked the Individual “When was the last time [he] had used [marijuana]?” The Individual replied “It has been a while, no, it’s been a long time. I don’t remember last.” The Interviewer then asked “give me a ballpark figure?” The Individual responded by stating, “Maybe like six years ago, maybe.” PSI at 66. Later in the PSI, he was again asked when was the last time he had used marijuana. The Individual responded “I would say maybe like six years ago, maybe seven years ago.” PSI at 70. The Notification Letter asserts that the above cited statements constitute an admission by the Individual that he had used marijuana in the seven year period preceding his completion and submission of the September 7, 2001 QNSP. However, the transcript of the PSI clearly shows that the Individual stated that he was unsure of when his last use of marijuana occurred and was offering the six to seven year figure as a very tentative estimate. Accordingly, the Individual’s statements during the February 28, 2002 PSI, standing alone, would not furnish a sufficient basis for concluding that the Individual had used marijuana during the seven year period prior to the September 7, 2001 QNSP.

However, the DOE Psychiatrist's Report,² states that, during the DOE Psychiatrist's forensic examination of the Individual, the DOE Psychiatrist asked the Individual when his last use of an illegal drug occurred. After first asserting that he did not remember, the Individual indicated he had used marijuana in 2000 and cocaine in 1999. DOE Exhibit 3 at 39. At the Hearing, however, the Individual initially testified that he thought he had informed the DOE Psychiatrist that his last drug use occurred in 1995. Tr. at 85. The DOE Counsel then reminded the Individual that the DOE Psychiatrist's Report states that the Individual informed the DOE Psychiatrist that he used marijuana in 2000 and cocaine in 1999. Tr. at 86. The Individual then testified that since he was being pressured to obtain his clearance by management, he had taken his answer to QNSP Question 24a "a little lightly." Tr. at 86-88. The Individual further testified that his provision of inaccurate information in the September 7, 2001 QNSP resulted from carelessness instead of a deliberate attempt to mislead. Tr. at 86-88, 97. Later on, the Individual testified that he had probably used illegal drugs in 2000. Tr. at 94-95. The Individual then described an incident where he rolled marijuana cigarettes in 2000 and passed them around a campfire. The Individual then testified "To me that's not smoking marijuana. Smoking marijuana is when - - well, I guess that's what you consider smoking." Tr. at 95.

The Individual's testimony at the Hearing establishes that the Individual used marijuana in 2000 and cocaine in 1999. Accordingly, the Individual provided DOE Security Officials with false information when he completed and submitted the September 7, 2001 QNSP. The Individual also provided misleading information to the DOE during the February 28, 2002 PSI when he repeatedly omitted mentioning his marijuana and cocaine use in 1999 and 2000. These omissions provide a sound basis for the LSO's decision to invoke Criterion F.

A finding of derogatory information does not, however, end the evaluation of evidence concerning the individual's eligibility for access authorization. *See Personnel Security Hearing, Case No. VSO-0244*, 27 DOE ¶ 82,797, *affirmed* (OSA, 1999); *Personnel Security Hearing, Case No. VSO-0154*, 26 DOE ¶ 82,794 (1997), *affirmed*, *Personnel Security Review, Case No. VSA-0154*, 27 DOE ¶ 83,008 *affirmed* (OSA, 1998). In the end, like all Hearing Officers, I must exercise my common sense judgment in determining whether an individual's access authorization should be restored after considering the applicable factors prescribed in 10 C.F.R. § 710.7(c). Therefore, I must consider whether the Individual has submitted sufficient evidence of mitigation to resolve the security concerns raised by his failure to honestly disclose his illegal drug use.

I am not convinced that the DOE can rely on the Individual to provide honest and accurate information in the future. On at least two occasions, the Individual has provided false information to LSO Security Officials. These falsifications establish a pattern of unreliability.

In a number of decisions, DOE hearing officers have considered the implications of falsifications. The factors considered in these cases include the following: whether the individual came forward voluntarily to renounce his falsifications, *compare Personnel Security Hearing, Case No. VSO-0037*, 25 DOE ¶ 82,778 (1995), *affirmed* (OSA, 1996) (voluntary

² The DOE Psychiatrist's Report appears in the Record as DOE Exhibit 3.

disclosure by the individual), *with Personnel Security Hearing, Case No. VSO-0327*, 28 DOE ¶ 83,005 (2000), *affirmed* (OSA 2000) (falsification discovered by DOE security); the length of time the falsehood was maintained; whether a pattern of falsification is evident; and the amount of time that has transpired since the individual's admission. *See Personnel Security Hearing, Case No. VSO-0327* (2000), *affirmed* (OSA, 2000) (less than a year of truthfulness insufficient to overcome long history of misstating professional credentials). *See also Personnel Security Hearing, Case No. VSO-0289*, 27 DOE ¶ 82,823 (1999) (19 months since last falsification not sufficient evidence of reformation from falsifying by denying drug use). *Personnel Security Hearing, Case No. VSO-0319*, 27 DOE ¶ 82,851 (2000), *affirmed* (OSA, 2000).

Turning to the present case, I note that the Individual did not come forward to voluntarily renounce his falsifications. Instead, the falsifications were detected by inconsistencies in the information he has provided during this proceeding. Moreover, the record shows at least two instances where the Individual provided the LSO with false or misleading information, thereby establishing a pattern of falsification. In addition, the Individual's provision of false or misleading information occurred relatively recently, in 2001 and 2002. These factors weigh against a finding that the Individual has mitigated the security concerns raised by his provision of false or misleading information to the LSO.

Our previous cases have stated that a subsequent pattern of responsible behavior is of vital importance to mitigating security concerns arising from irresponsible behavior. *See Personnel Security Hearing, Case No. VSO-0499*, 28 DOE ¶ 82,850 (2002). In most cases in which hearing officers have concluded that doubts about an individual's judgment and reliability raised by evidence of falsification have been resolved, a substantial period of time has passed since the falsification. In these cases, the time period has allowed individuals to establish a pattern of responsible behavior. In those cases where an individual was unable to establish a sustained period of responsible behavior, hearing officers have generally determined that the individual was not eligible to hold an access authorization. *See Personnel Security Hearing, Case No. VSO-0448*, 28 DOE ¶ 82,816 (2001) (11 months not sufficient to mitigate four year period of deception); *Personnel Security Hearing, Case No. VSO-0327*, 27 DOE ¶ 82,844 (2000) (less than one year of truthfulness insufficient to overcome long history of misstating professional credentials); *Personnel Security Hearing, Case No. VSO-0289*, 27 DOE ¶ 82,823 (1999) (19 months since last falsification not sufficient evidence of reformation). In the present case, the Individual has not established a significant pattern of responsible behavior. Therefore, the security concerns associated with his falsifications remain unmitigated. Accordingly, the security concerns set forth in the Notification Letter under Criterion F remain unresolved.

B. Criterion K

The Individual has admitted to using marijuana, cocaine, and LSD. PSI at 57-75; DOE Exhibit 3 at 39-40. Accordingly, the information in the Record provides a sound basis to invoke Criterion K. Illegal drug use evidences an unacceptable and disturbing disregard for laws prohibiting their use. Such disregard for the law raises concerns that the Individual may similarly disregard other laws, including those which protect classified information and special nuclear materials. *See Personnel Security Hearing, Case No. VSO-0116*, 26 DOE ¶ 82,765 at 85,602 (1997) *citing*

Personnel Security Hearing, Case No. VSO-0013, 25 DOE ¶ 82,752 at 85,512 (1995)). Moreover, the use of illegal drugs (and the disregard for law and authority that such use suggests) indicates a serious lapse in judgment and maturity. Involvement with illegal drugs may also render the user susceptible to blackmail or coercion.

The only evidence in support of mitigation of the security concerns raised under Criterion K are the Individual's assertions that he no longer uses illegal drugs and plans to refrain from using them in the future. Given my conclusions in sections III.A (above) and III.D (appearing below), in which I have found that the information provided by the Individual concerning his illegal drug use is less than reliable, I am not convinced that a sufficient period of time has elapsed since the Individual's last illegal drug use. Therefore I find that the security concerns raised under Criterion K have not been resolved.

C. Criterion J

The Notification Letter alleges that the Individual "has been or is a user of alcohol habitually to excess." The bases for this charge are the Individual's Driving While Intoxicated (DWI) arrests on September 5, 1993 and April 3, 2004. It is important to note that the Notification Letter does not allege that the Individual suffers from Alcohol Abuse or Dependence.

I note that the issue before me, whether the Individual is a habitual user of alcohol to excess, is difficult to address. Neither the Part 710 Regulations (the Regulations) nor the DOE's Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, set forth at Appendix B to Subpart A of 10 C.F.R. Part 710 (the Guidelines) define the terms "habitual" or "excess." It is safe to assume that "by excess" it is meant intoxication. Webster's Ninth Collegiate Dictionary provides the following definitions of habitual, which state in pertinent part: "having the nature of a habit: being in accordance with habit : CUSTOMARY, . . . doing, practicing or acting in some manner by force of habit, . . . resorted to on a regular basis, [or] inherent in an individual." Webster's Ninth Collegiate Dictionary (1985) at 545.

I need not parse the definition of the term too finely in order to determine whether the LSO has a sufficient basis to invoke Criterion J. In the instant case, the Individual has acknowledged that his past use of alcohol was excessive and problematic. Since the Individual has testified that he recognizes that he should abstain from the use of alcohol, it is safe to conclude that the Individual does not dispute that he has habitually used alcohol to excess in the past. Moreover, both the EAP counselor and the DOE Psychiatrist convincingly testified that they believed the Individual has habitually used alcohol to excess. Tr. at 44-45, 101-06.

As explained below, the Individual has convinced me that he has discontinued his use of alcohol completely and intends to refrain from any use of alcohol in the future. The Individual testified that he has refrained from the use of alcohol since May 2004. Tr. at 71. The Individual further testified credibly that he intends to refrain from using alcohol in the future. Tr. at 72-80. I find the Individual's testimony that he has refrained from using alcohol for the 15 months preceding the Hearing to be credible.

The Individual's EAP Counselor testified at the Hearing on behalf of the Individual. The EAP Counselor testified that the Individual has attended 36 weekly counseling sessions. Tr. at 39. The EAP Counselor testified that the Individual has made significant gains in understanding his history with alcohol and the effects of growing up in a family where alcoholism was an important presence. Tr. at 40. The EAP Counselor testified that the Individual was attending Alcoholics Anonymous (AA) meetings and was working the AA Program. Tr. at 40, 48-49, 51-52. The EAP Counselor testified that he believes that the Individual is strongly committed to avoiding alcohol use in the future and to continuing with the AA Program. Tr. at 42, 60. The EAP Counselor further testified that he believes the Individual was very honest during his counseling sessions. Tr. at 43. The EAP Counselor opined that the Individual has done very well in counseling. Tr. at 47-48.

The DOE Psychiatrist has opined that the Individual should be required to have completed the same rehabilitation or reformation program that an individual with an Alcohol Abuse or Dependence diagnosis would need to mitigate the security concerns raised by those disorders.³ I am not of that same opinion. Individuals with substance abuse disorders have medical disorders requiring treatment and it is well settled that such individuals face a significant risk of relapse. However, the Individual's alleged past habitual intoxication has not been shown to be the result of a disorder. In my opinion, the Individual's 15 months of abstinence, his commitment to refrain from using alcohol in the future and the testimony of the EAP Counselor suffice to resolve any security concerns raised by his use of alcohol.⁴

D. Criterion L

On July 2, 2002, the Individual signed a DOE Drug Certification. By signing this DOE Drug Certification the Individual certified that he would not become involved with illegal drugs while maintaining a DOE access authorization.

The DOE Psychiatrist's Report indicates that during the July 13, 2004 Forensic Psychiatric Examination, the Individual informed the DOE Psychiatrist that he "may" have smoked a cigarette laced with cocaine. If the Individual voluntarily consumed a cigarette laced with cocaine, he violated his DOE Drug Certification. Violation of the DOE Drug Certification presents serious security concerns. *Personnel Security Hearing, Case No. VSO-0208*, 27 DOE ¶ 82, 774 at 85,655 (1998). Not only does it bring into question the Individual's judgment and

³ The Regulations do not require that a determination that a person is or has been a user of alcohol habitually to excess be supported by the opinion of a medical professional.

⁴ The DOE Psychiatrist's testimony indicates that he suspects the Individual might have an alcohol related disorder for which he was unable to gather sufficient evidence. Tr. at 108. This concern was apparently based upon the Individual's alleged long history of drinking habitually to excess, the Individual's family history of Alcohol Dependence and the DOE Psychiatrist's concern that the Individual was close to meeting some of the criteria for Alcohol Dependence.

trustworthiness, but it raises concerns about the possibility of future drug use.

The circumstances and context surrounding this statement strongly suggest that the Individual engaged in illegal drug use in violation of his DOE Drug Certification. The DOE Psychiatrist's Report indicates that the DOE Psychiatrist asked the Individual a number of questions in order to specifically determine the date of the Individual's last illegal drug use. The Individual originally indicated that he had last used marijuana in 2000 and cocaine in 1999. DOE Exhibit 3 at 39. The DOE Psychiatrist obviously harbored some concerns about the veracity of these answers. He then proceeded to challenge the Individual's statements. As the DOE Psychiatrist's Report states, in pertinent part,

I then told the [Individual] that he probably had a couple of months of drug use history in his hair. I asked him, 'Will there be any drugs in your hair if I test it?' He said, 'one other time, a friend of mine gave me a cigarette and it might have had [cocaine] on it.' I asked him when this was and he said in December of 2003. I asked him what his friend said about the cigarette and he said 'he said nothing.' I asked 'What was the effect of smoking the cigarette?' He said, 'It gave me a rush.'

I asked the [Individual] if the laced cigarette was a hand rolled joint. He said that it was a regular cigarette with something in it. I asked him if he smokes regular cigarettes. He said he does sometimes, maybe a pack every two weeks.

DOE Exhibit 3 at 39-40 (footnotes omitted). At the Hearing, the Individual testified that he had borrowed a Marlboro cigarette from a person with a past history of drug use. Tr. at 89. According to the Individual, this cigarette "kind of tasted funny." *Id.* The Individual then testified that he now attributes this difference in taste to the fact that the cigarette he borrowed came from a "hard pack" while he was used to smoking Marlboro cigarettes sold in the "soft pack." Tr. at 90 and 92. The DOE Counsel, on cross-examination, asked the Individual about the Individual's experience with using cocaine. The DOE Counsel noted that the Individual had told the DOE Psychiatrist that he had used cocaine ten to twelve times and had described the effect that cocaine had on him as "a rush and a high feeling." Tr. at 91-92. The DOE Counsel asked whether the cigarette had given him a rush. The Individual responded by stating: "Every cigarette, whether -- it depends on how you smoke it, it's going to give you a rush, or if it's the first cigarette of the day or whatever." Tr. at 92. The DOE Counsel then asked why he reported this particular cigarette to the DOE Psychiatrist. The Individual responded by stating:

Because if they took me and they took the hair off of me and gave me a drug test, well if something came up, well how would I know -- how would I know if it was put in my food, because I wasn't doing drugs. You know what I mean? So I figured if something did come up in my hair, whatever, I would say maybe that's what happened.

Tr. at 92-93. The Individual's response to the DOE Psychiatrist and the Individual's testimony at the Hearing concerning this matter do not appear to be candid. It is notable that the Individual's claim that he may have unknowingly borrowed a tainted cigarette occurred right after the DOE Psychiatrist indicated that he was going to run a laboratory test to detect illegal drug use and right after the Individual had claimed his last use of illegal drugs had occurred in 2000. I am therefore left with the impression that the Individual was not confident that a drug test would exonerate him. Accordingly, I find that the Individual has not resolved the security concerns raised under Criterion L.

IV. CONCLUSION

For the reasons set forth above, I conclude that the Individual has resolved the security concerns raised under Criterion J. However, the Individual has not resolved the security concerns raised under Criteria F, K and L. Therefore, the Individual has not demonstrated that restoring his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, it is my opinion that the Individual's access authorization should not be restored. The Individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: December 22, 2005